Supreme Court, U.S.
FILED
JUL 14 1995
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No. 94-2015

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

JOHN C. KALENBERG and RICHARD M. STARK,
*Petitioners,*

v.

HENRY S. REINKE d/b/a LAKESIDE PROPERTIES,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Seventh Circuit, sitting in diversity in a second state, must automatically give *res judicata* effect to a state court judgment dismissing the case when it is undisputed that the dismissal is based on the rendering state's procedural statute of limitations rule, and where the Seventh Circuit's decision is based on the application of settled state and federal law, and no conflict exists in the Circuits.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Henry S. Reinke d/b/a Lakeside Properties, respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Petitioners, John C. Kalenberg and Richard M. Stark.

## COUNTER-STATEMENT

Petitioners' Statement of the Case makes improper argument and contains erroneous facts. Most significantly, however, it mischaracterizes the Seventh Circuit's opinion by wrongly insinuating that only the Seventh Circuit, in contrast to the three earlier courts, considered as procedural the rule which served as the basis of the Minnesota court's dismissal of the Respondent's suit. In fact,

each and every court below, including both Minnesota courts, stated or accepted the conclusion that statutes of limitations in Minnesota are procedural. For the foregoing reasons, Respondent provides this counter-statement.

In September 1988, Respondent, Henry S. Reinke d/b/a Lakeside Properties ("Reinke"), an Illinois resident, filed suit in the state district court of Minnesota claiming that the Petitioners had breached a written guarantee of lease. (App. A-2, B-2, D-6, and E-3.)[1] The Petitioners are residents of Minnesota. In 1991, Petitioners, along with another defendant who subsequently settled with Reinke, moved for summary judgment. They argued that Minnesota's six year statute of limitations barred Reinke's complaint because a statute of limitations relates to procedure and remedy and is governed by the law of the forum (Minnesota). The Minnesota trial court agreed: "It is well-settled in our courts that limitation of time statutes generally are procedural and that the law of the forum is applied." (App. D-4.) The trial court held that Reinke's cause of action fully accrued in 1982 and entered judgment against Reinke on the basis that his complaint was time barred.

On Reinke's appeal, the Minnesota Court of Appeals affirmed and ruled that the trial court properly applied Minnesota's limitations law. In an unpublished opinion dated March 10, 1992, it concurred with the trial court that a statute of limitations involves "procedure and remedies", and therefore, the limitations laws of the forum (Minnesota) would apply, not the limitations laws of Illinois. (App. E-4.) Reinke's petition for review to the Minnesota Supreme Court was denied in May 1992.

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[1] Petitioners misstate the Minnesota filing date as being a year later, September 1989. Petition at 4.

Meanwhile, Reinke acted to preserve his cause of action under Illinois' ten year statute of limitations, 735 ILCS 5/13-206 (1992). In February 1992, Reinke filed a diversity action in the United States District Court for the Northern District of Illinois. In July 1992, the defendants moved for summary judgment, arguing that Minnesota's *res judicata* principles controlled Reinke's Illinois diversity action under the Constitution's Full Faith and Credit Clause and its federal statutory counterpart, 28 U.S.C. § 1738, and that the Minnesota judgment precluded Reinke's Illinois diversity action.

The district court acknowledged at the start the Minnesota courts' finding "that statutes of limitation are procedural." (App. A-2.) Nevertheless, it found the trial court's grant of summary judgment to be a bar to a subsequent federal suit in Illinois. It stated that Minnesota Rule of Civil Procedure 41.02 (48 M.S.A., RCP 41.02(c)) makes a dismissal based on the statute of limitations an adjudication "on the merits" and, under the doctrine of *res judicata*, a bar to subsequent suits in Minnesota if they concern the same cause of action: "Because Minnesota courts would consider plaintiff's [Reinke] Minnesota lawsuit precluded, so must this court." (App. A-6.)

On January 10, 1995, the Seventh Circuit reversed, holding that Minnesota's judgment did not preclude an action in the district court of Illinois. The Seventh Circuit focused on the Minnesota courts' "frank and explicit acknowledgement that statute of limitations matters are procedural and that a forum ought to use its own procedure." (App. B-12.) The court of appeals determined that Minnesota did not intend to make a judgment based on one of its "internal procedural rules" binding on *all* other jurisdictions; it distinguished those authorities which appeared to permit such preclusion as involving intrasystem use of *res judicata* and explained that such situations invoke a diverse

set of interests and motivations not present in an inter-system setting such as the case *sub judice*. (App. B-12-15.) Indeed, the Seventh Circuit relied on settled authority, including Minnesota case law, to temper the "broad extension" of preclusion endorsed by the district court.[2] The Seventh Circuit concluded that "no deference is owed to the Minnesota judgment," that the law of the second forum (Illinois) does not bar the suit, and that the case should be reversed and remanded to the district court for further proceedings. (App. B-18-19.)

The Seventh Circuit issued its mandate on February 1, 1995. Approximately two months later, on March 28, 1995, the Petitioners filed their Motion to Recall Mandate. Reinke filed a response objecting to a recall of the mandate, and, on April 3, 1995, the Seventh Circuit denied the Petitioners' motion. On March 31, 1995, the Petitioners applied to this Court for an extension of time to file their petition. That same date, the court granted the extension and extended the time to file to June 9, 1995. Reinke's application for reconsideration of that order was denied on April 7, 1995. Petitioners filed their petition on June 9, 1995.

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[2] Petitioners misstate in their Statement of the Case that the Seventh Circuit regarded *Nitz v. Nitz*, 456 N.W.2d 450 (Minn. Ct. App. 1990), "as irrelevant to their consideration." See Petition at 8. In fact, the Seventh Circuit used *Nitz* to support its decision. (See App. B-17.)

## REASONS FOR DENYING THE WRIT

The Court should deny review for at least two reasons. First, the Petitioners have manufactured a conflict where none exists. The alleged "conflict" is inspired by the Petitioners' misreliance on cases with materially distinct facts—cases involving successive suits within the same court system. Such decisions contrast markedly with intersystem (state-to-state) scenarios where cases and learned treatises consistently maintain that the second forum may apply its own statute of limitations. This intrasystem-intersystem dichotomy is the touchstone of the Seventh Circuit's ruling, yet the Petitioners inexplicably ignore it. Despite the Petitioners' claim, there is no actual conflict between the decision of the United States court of appeals in the case at bar and any other United States court of appeals decision on the same subject, nor does the decision conflict with Minnesota or Illinois authority.

Second, the Petitioners' argument is predicated on the untenable contention that a state court judgment based on application of one of its procedural rules always bars a party with an otherwise viable claim from bringing suit in a different jurisdiction. This Court reiterated in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), that the Full Faith and Credit Clause does not require that a state's application of *res judicata* principles be automatically transported across state lines to another proceeding. Cognizant that there is some limitation, and consistent with the weight of authority, the Seventh Circuit began its analysis with the well recognized principle that federal courts honor state judgments as a matter of full faith and credit. The Petitioners argue that the Seventh Circuit should have immediately ended its inquiry there, that full faith and credit demands that a federal court slavishly accept another state court's judgment, no questions asked. Such

servitude forecloses examination of the procedural reality of the Minnesota judgment, a reality exposed in this case, not by an "overreaching" federal court in Illinois as contended by the Petitioners, but rather, by every court below, including the two Minnesota state courts. The Seventh Circuit properly examined the Minnesota judgment and correctly concluded that "Minnesota has no interest in barring further litigation in another forum, state or federal." (App. B-16.)

## I.

## THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH FEDERAL AND STATE COURT DECISIONS ON THE SAME MATTER AND APPLICABLE DECISIONS OF THIS COURT

Both federal and state courts have long recognized and accepted that where the first judgment has been issued on the basis of the rendering state's statute of limitations, a second action is not necessarily precluded by *res judicata* or full faith and credit if the second state's statute of limitations permits the action. This Court in *Bank of United States v. Donnally*, 8 Pet. (33 U.S.) 361 (1834), stated that the dismissal of an action for payment of a promissory based on the rendering state's (Virginia) statute of limitations would not be *res judicata* in another forum:

> As the contract, upon which the original suit was brought, was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitations, will operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky.

33 U.S. at 370. The decisions in *Allen v. McCurry*, 449 U.S. 90 (1980), *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), do not purport to overrule *Donnally* and there is no conflict created by them. None of those latter cases involved state-to-state settings nor did they discuss the considerable weight accorded a local forum to apply its statute of limitations. Such weight fully comports with full faith and credit and due process. *Ferens v. John Deere Co.*, 494 U.S. 516, 521 (1990).

Under the Petitioners' theory, not only is Reinke's contract action barred in Minnesota, it is barred in every court of the land. The Petitioners' interpretation of *res judicata* effectively converts Minnesota's statute of limitations into an integral part of Reinke's cause of action, *i.e.*, Reinke's substantive contract right, not just his remedy, is extinguished by Minnesota's procedural rule. In *Fender v. St. Louis Southwestern Ry. Co.*, 392 N.E.2d 82, 73 Ill. App.3d 522 (Ill. App. Ct. 1979), the Illinois appellate court, citing the Restatement (Second) of Conflict of Laws, stated that because a statute of limitations will only affect the remedy and not a litigant's substantive rights (as did the two Minnesota courts, App. D-4, E-4), "a decision of a court of one State holding that an action is barred by a statute of limitations will preclude the maintenance of a subsequent action in another state on the same claim only if the same statute of limitations applies." 73 Ill. App.3d at 526, *citing* Restatement (Second) of Conflict of Laws § 110, comment b (1971). *See also*, 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure, § 4441 at 369-372 (1981) (where the second state is the residence of the plaintiff, which state enjoys and applies its own statute of limitations, the second state is not precluded by the dismissal of the first

action based on the rendering state's statute of limitations).[3]

There is considerable case authority on the side of *Fender* and its holding of limited preclusion in a state-to-state setting. The Second Circuit extensively cited *Donnally*, among other cases, in holding that "[a] decision that the Ohio statute of limitations barred the remedy was not *res judicata* in an action to assert plaintiffs' right in another forum." *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 541 (2d Cir. 1933), *cert. denied*, 291 U.S. 678 (1934). *See also, Northern Natural Gas Co. v. Grounds*, 931 F.2d 678 (10th Cir. 1991); *Henson v. Columbus Bank and Trust Co.*, 651 F.2d 320 (5th Cir. 1981); *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566 (11th Cir. 1985); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 880 F.2d 818 (5th Cir. 1989); *Cummings v. Cowan*, 390 F. Supp. 1251 (N.D. Miss. 1975); Restatement (Second) of Judgments § 19, comment f (1982) (a first judgment dismissed for failure to comply with that state's statute of limitations does not preclude the same action in a second state under that state's longer statute of limitations).

The extent to which the Petitioners must stretch to create the appearance of a conflict is exemplified by their reliance on *Hapaniewski v. City of Chicago Heights*, 684 F. Supp. 1011 (N.D. Ind. 1988), *aff'd*, 883 F.2d 576 (7th Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). As discussed earlier, the linchpin of the Seventh Circuit's decision is the dichotomy between intrasystem and intersystem *res*

[3] Although Minnesota preclusion law does not apply, the rule in that state appears to be no different. The Seventh Circuit explained that Minnesota would also limit preclusion in a state-to-state situation involving a statute of limitations. (App. B-17, citing *Nitz v. Nitz*, 456 N.W.2d 450 (Minn. Ct. App. 1990).)

*judicata*: "This difference is not a formalistic one." (App. B-14.) The Petitioners resolutely ignore the distinction, but of all the cases they cite, it is noteworthy that only *Hapaniewski* contains a factual setting remotely comparable to this case and that the Petitioners single out *Hapaniewski* for the assertion that it presents the "same *res judicata* issue." This is tantamount to a concession that the Petitioners' other cited authorities do not. The alleged conflict between this Court's holdings and the Seventh Circuit's decision is an apparition even the Petitioners have difficulty defining.

Further, *Hapaniewski* does not support the Petitioners' argument. The case was dismissed first in an Illinois state court based on Illinois' statute of limitations. The plaintiff thereupon filed the same case in the District Court for the Northern District of Indiana and later moved to transfer it to another venue after conceding that venue in Indiana was improper under 28 U.S.C. § 1391(b). The federal district court dismissed the case, holding that neither the parties nor the claim had any connection to the State of Indiana at the time of filing, and that there was "no possible basis for this court's assertion of personal jurisdiction over the defendants." 684 F. Supp. at 1014.[4]

The Petitioners omit significant portions of the procedural history of *Hapaniewski* to prop up their petition. Although not explicitly stated in the opinion, venue was most likely proper only in a district court in Illinois—all the defendants resided in Illinois and the action arose there. 684 F. Supp. at 1013. The *Hapaniewski* court elaborated on the *res judicata* issue merely to establish that

[4] The Seventh Circuit noted that in the instant matter, "[t]here are no issues regarding the requisite diversity jurisdiction or the exercise of *in personam* jurisdiction." (App. B-7.)

the suit was frivolous even if filed in the proper venue, and therefore, warranted dismissal rather than transfer. *Id.* at 1014. Viewed in this new light, the court's dictum about the *res judicata* effect of the Illinois state court judgment is more a prediction of what law a federal court *sitting in Illinois* would apply rather than a statement about what the district court in Indiana would do.[5] Worse yet for the Petitioners' argument, on appeal, the Seventh Circuit found the "doctrine of *res judicata* [to be] inapplicable to Hapaniewski's claims because there was no final adjudication in the Illinois state court proceeding." 883 F.2d 576, 580. Taken together, the facts of the case make it of little value for this proceeding or for the doctrines of *res judicata* and full faith and credit, yet the Petitioners disingenuously use it to suggest confusion within the Seventh Circuit over the issues.

There is no uncertainty or confusion about the limited preclusive effects of the Minnesota judgment. The Minnesota courts, much like Illinois and federal courts, stated that a forum ought to use its own statute of limitations. Consistent with the weight of authority, that is precisely what the Seventh Circuit did.

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[5] Like the Petitioners' other cases, *Hapaniewski* actually involves another intrasystem situation because the district court in Illinois would follow Illinois law and policy. *Angel v. Bullington*, 330 U.S. 183, 191 (1947). Although *Hapaniewski* was not a diversity action such as the case at bar, such an action also requires the federal court to apply the statute of limitations of the state in which it sits. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945).

## II.

## FULL FAITH AND CREDIT DOES NOT REQUIRE THE COMPLETE IMPORTATION OF MINNESOTA'S RULES TO THIS ILLINOIS DIVERSITY-BASED SECOND PROCEEDING

The Seventh Circuit correctly concluded that the *res judicata* principles developed in state-to-state applications such as the case *sub judice* are fundamentally different from the second forum-same state scenarios more commonly encountered by the courts. *Res judicata* is a collection of rules dependent on differing applications in differing circumstances. 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure, § 4401 at 3 (1981). Contrary to the Petitioners' claim, the Seventh Circuit did not "overreach" by inquiring into the nature and scope of the Minnesota judgment.

The Petitioners misconstrue *Allen*, *Migra*, and *Marrese*, *supra*, to import this Minnesota judgment based upon a procedural rule into an Illinois federal district court exercising diversity jurisdiction. But, "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988), *quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). Under the doctrine established since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the federal district court below was required to apply Illinois' laws, as would any state court in Illinois.

*Erie* requires the federal court to apply Illinois' choice of law principles (*Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)) and its statute of limitations (*Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)) to this action. *See* n.5, *supra*. This does not clash with *res*

*judicata* principles because such precepts have never been imported absolutely through full faith and credit: "To be sure, the structure of our Nation as a union of States, each possessing equal sovereign powers, dictates some basic limitations on the full faith and credit principles. . . ." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accidental Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982). The second state's sovereignty weighs considerably in any state-to-state application and will sometimes result in the refusal to transfer totally the preclusion principles applicable in the rendering state, thereby allowing the second court, be it state or federal in diversity, to apply its local laws, particularly those of limitations on actions. *Sun Oil*, 486 U.S. at 724-726; *Klaxon*, 313 U.S. at 496.

Here, the second forum, Illinois, would find that the Minnesota statute of limitations does not apply to this action because "[s]tatutes of limitations are procedural, affecting only the remedy available and not the substantive rights of the parties, and are governed by the law of the forum State." *Cox v. Kaufman*, 571 N.E.2d 1011, 212 Ill. App.3d 1056, 1062 (Ill. App. Ct. 1991), *appeal denied*, 580 N.E.2d 110, 141 Ill.2d 537 (1991). Illinois has a "borrowing" statute of limitations which can sometimes apply another state's statute of limitations. *See* 735 ILCS 5/13-210 (1992). In this matter, however, the borrowing statute will not apply Minnesota's statute of limitations; the Illinois borrowing statute will only import another state's limitation of time rule where none of the parties are Illinois residents. *See Hollins v. Yellow Freight System, Inc.*, 590 F. Supp. 1023, 1026 (N.D. Ill. 1984), and cases cited therein. Because there is no borrowing, Illinois' ten year statute applies, not Minnesota's six year statute of limitations. The dismissal of the first action on Minnesota's statute of limitations does not preclude this second action.

## CONCLUSION

The decision of the Seventh Circuit finding Reinke's action not barred by *res judicata* is consistent with Illinois and federal claim preclusion law and is not in error. Further, there is no reason warranting exceptional treatment for this case and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 1995